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No. 99-1748

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

WILLIAM LEE WILEY,

Petitioner,

VERSUS

STATE OF MISSISSIPPI,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

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BRIEF IN OPPOSITION

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Supreme Court of the United States

CAPITAL CASE

QUESTIONS PRESENTED

I. THE COURT BELOW DID NOT ERR IN HOLDING THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE "AVOIDING ARREST" AGGRAVATING FACTOR ON DIRECT APPEAL, THEREFORE CERTIORARI SHOULD BE DENIED.

II. THE COURT BELOW DID NOT ERR IN HOLDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE SO-CALLED "SEND A MESSAGE" ARGUMENT AT THE SENTENCING HEARING IN THIS CASE, THEREFORE CERTIORARI SHOULD BE DENIED.

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NO. 99-1748

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

WILLIAM LEE WILEY,
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

This matter is before the Court on the petition of William L. Wiley for a Writ of Certiorari to the Supreme Court of Mississippi wherein the court below denied Wiley's petition for post-conviction relief on his conviction of capital murder and sentence of death.

OPINION BELOW

The opinion of the Mississippi Supreme Court denying

post-conviction relief for petitioner's sentence of death is reported as *Wiley v. State*, 750 So.2d 1193 (Miss. 1999). The slip opinion is reprinted as Appendix A to Wiley's petition for writ of certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to the authority of 28 U.S.C. §1257(3) challenging the constitutionality of his sentence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has relies on the provisions of the United States Constitution, Amendments Six, Eight, and Fourteen. Petitioner has set forth the pertinent text of these provisions in his petition.

STATEMENT OF THE CASE

A. Substantive Facts:

The facts as reflected by the record in this case show that J. B. Turner operated a convenience store in rural DeSoto

County, Mississippi. In the early morning hours of August 22, 1981, as Turner and his daughter were closing the store for the night, Wiley fired three shots with a shotgun, killing Mr. Turner and seriously wounding and blinding his daughter. Wiley then took Turner's money sack containing between $350 and $400. Turner had been shot twice and died on the ground in front of his store.

In a search of the immediate area, a shotgun was discovered behind Turner's store. This shotgun was traced to Wiley as the owner. Wiley was arrested and confessed to the robbery and murder stating, "I just shot up, but I definitely hit [Turner]." He then led police officers to the place where he had discarded the money sack and to the automobile he had used to hide the shotgun before the robbery and murder.

The facts of the crime giving rise to this case are fully set forth in this Court's opinion in both *Wiley v. State*, 449 So.2d 756, 757 (Miss. 1984) (*Wiley I*) and *Wiley v. State*, 484 So.2d

339, 342 (Miss. 1986) (*Wiley II*). *See also Wiley v. State*, 691 So.2d 959, 960 (Miss. 1997). The State would adopt these statements as a further statement of the facts as if incorporated herein.

B. Procedural History:

The case at bar originated in the Circuit Court of DeSoto County, Mississippi, wherein Wiley was indicted during the Special September Term of 1981, for the crime of capital murder while engaged in the commission of a robbery in violation of MISS. CODE ANN. §97-3-19(2)(e) (Supp. 1981). The indictment grew out of the August 22, 1981, murder of Mr. J. B. Turner. Wiley was tried in February, 1982, and at the conclusion of the trial on guilt the jury returned a verdict of guilty of capital murder. In a separate hearing, he was sentenced to death. On direct appeal to the Mississippi Supreme Court the court affirmed the conviction of guilt, but reversed the death sentence. *Wiley v. State*, 449 So.2d 756

(Miss. 1984).

A new sentencing trial for Wiley was held in June, 1984. At the conclusion of this sentencing hearing, the jury again returned a sentence of death on June 20, 1984. Wiley then appealed this second death sentence to the Mississippi Supreme Court. On February 19, 1986, the court below rendered its decision in a written opinion affirming the sentence of death. A timely petition for rehearing was denied by the Court on March 19, 1986. *Wiley v. State*, 484 So.2d 339 (Miss.1986).

Wiley then sought relief in this Court by way of a petition for writ of certiorari to the Mississippi Supreme Court. On October 14, 1986, this petition was denied. *Wiley v. Mississippi*, 479 U.S. 906 , *reh. denied*, 479 U.S. 999 (1986).

Relief was next sought by Wiley by filing an Application for Leave to File Motion to Vacate, or Set Aside Judgment, Conviction and Sentence of Death filed with this Mississippi Supreme Court. Wiley's application was denied in a written

opinion on November 25, 1987. *Wiley v. State*, 517 So.2d 1373 (Miss.1987) (*Wiley III*). His petition for rehearing from this adverse ruling on this Application was subsequently denied on January 13, 1988.

Wiley again sought relief from this Court by filing a petition for a writ of certiorari. The petition was denied on May 31, 1988, *Wiley v. Mississippi*, 486 U.S. 1036, *reh. denied*, 487 U.S. 1246 (1988).

Thereafter, Wiley filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Mississippi, Western Division. On May 4, 1990, the District Court entered an unpublished memorandum opinion and order in *Wiley v. Puckett*, No. DC88-132-B-O, denying the petition for writ of habeas corpus without an evidentiary hearing. On June 18, the district court denied a certificate of probable cause.

Wiley then sought a certificate of probable cause from the United States Court of Appeals for the Fifth Circuit. That

court granted a certificate of probable cause allowing Wiley to appeal on November 5, 1990. After consideration the Fifth Circuit affirmed the district court's denial of relief as to the guilt phase of Wiley's capital murder trial and reversed the district court's finding that the sentence phase was not flawed on the basis of *Stringer v. Black*, 503 U.S. 222 (1992), *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *Maynard v. Cartwright*, 486 U.S. 356 (1988). The case was remanded to the district court with instructions to grant the writ of habeas corpus as to the sentence of death if the State did not initiate appropriate proceedings in state court within a reasonable time to have the sentence reconsidered. *Wiley v. Puckett*, 969 F.2d 86 (5th Cir. 1992).

Appropriate state court proceedings were initiated in the Mississippi Supreme Court within a reasonable time after the district court entered its order. The court below remanded the case for a yet another sentencing hearing. *Wiley v. State*, 635

So.2d 802 (Miss. 1993) (*Wiley IV*).

Again a jury was empaneled in the Circuit Court of DeSoto County, and a new trial was held on the issue of sentence alone. After consideration of aggravating and mitigating evidence the jury returned a sentence of death in the following form:

> We, the Jury, unanimously find from the evidence, beyond a reasonable doubt, that the following facts existed at the time of the commission of the Capital Murder:
>
> 1.) The Defendant actually killed J. B. Turner;
>
> 2.) The Defendant intended that the killing of J. B. Turner take place; and
>
> 3.) That the Defendant contemplated that lethal force would be employed.
>
> We, the Jury, unanimously find that the aggravating circumstances of:
>
> 1.) The Capital Offense was committed while Defendant was engaged in the commission of a

Robbery;

2.) The Capital Offense was committed for the purpose of avoiding or preventing a lawful arrest,

are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances; and we unanimously find that the Defendant should suffer death.

State Court Clerk Papers at 185.

Wiley then took his automatic appeal to the court below. On February 13, 1997, the Mississippi Supreme Court affirmed the sentence of death in a written opinion. The petition for rehearing was denied on April 17, 1997. *Wiley v. State*, 691 So.2d 959 (Miss. 1997) (*Wiley V*).

Wiley then sought relief by filing a petition for writ of certiorari with this Court. On October 6, 1997, this Court denied the petition for writ of certiorari. *Wiley v. Mississippi*, 522 U.S. 886 (1997). No petition for rehearing was filed.

On April 17, 1998, Wiley's counsel filed an Motion to Vacate Death Sentence with the Mississippi Supreme Court. In his initial Application Wiley raised the following claims:

A. Wiley Was Denied His Constitutional Right to the Effective Assistance of Counsel at His Sentencing Trial.

1. Wiley's Trial Counsel Was Ineffective for Failing to Object to the State's Improper Suggestion That Wiley Would Be Paroled If the Jury Did Not Sentence Him to Death.

2. Wiley's Trial Counsel Was Ineffective for Failing to Oppose the Complete Elimination of Mercy and Sympathy from the Jury's Consideration.

B. Wiley Was Denied His Constitutional Right to Ineffective Assistance of Counsel on Appeal of His Sentencing Trial.

1. Wiley's Appellate Counsel Was Ineffective for Failing to Appeal the Jury's Finding of the "Avoiding Arrest" Aggravating Factor.

a. The Evidence in this Case Cannot Support the Jury's Finding on the "Avoiding Arrest" Aggravating Factor.

b. If the "Avoiding Arrest" Aggravating Factor Is Broad Enough to Include the Evidence in this Case, Then That Aggravating Factor Is Unconstitutionally Overbroad.

c. If the "Avoiding Arrest" Aggravating Factor Is Broad Enough to Include the Evidence in this Case, Then That Aggravating Factor Impermissibly Duplicates the "Robbery" Aggravating Factor.

2. Wiley's Appellate Counsel Was Ineffective for Failing to Inform this Court of Record Evidence of Improper Comments by the State Regarding the Possibility of Parole.

C. Wiley Was Denied His Constitutional Right to a Fair Trial.

1. Wiley's Rights Were Violated by the State's Suggestions That Wiley Would Be Paroled If the Jury Did Not Sentence Him to Death.

2. The Trial Court's Striking All References to Mercy and Sympathy from the Jury Instructions Was Unconstitutional.

3. Imposition of the Death Penalty in Reliance on the "Avoiding Arrest" Aggravating Factor Was Unconstitutional.

4. Wiley's Rights Were Violated by the Trial Court's Improper Discussion with the Venire about the Possibility of Parole.

5. The Trial Court's Failure to Instruct the Jury on a Statutory Mitigating Factor of "Diminished Capacity" Deprived Wiley of His Rights.

6. It Was Arbitrary and Capricious to Find That Wiley's Death Sentence Was Proportional to Comparable Cases.

D. The Cumulation of Error in This Case Requires Reversal.

On June 30, 1998, an Amended and Restated Application for Leave to File Motion to Vacate Death Sentence was filed by Wiley's counsel adding the following claim to his application.

3. Wiley's Trial Counsel Was Ineffective for Failing to Object to the State's Improper "Send a Message" Argument During Closing Argument.

On June 3, 1999, the Mississippi Supreme Court rendered its opinion denying post-conviction relief on all claims. A petition for rehearing was filed and subsequently denied on February 3, 2000. *Wiley v. State*, 750 So.2d 1193 (Miss. 1999).

From this adverse decision on application for post-conviction relief Wiley brings this petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

The court below in assessing the claims of ineffective assistance of counsel raised here found that counsel was not ineffective because the underlying substantive claims were without merit. Therefore, the court below held that petitioner could not meet the prejudice prong announced in *Strickland.*

Petitioner presents no cognizable claim under the Constitution or statutes of the United States upon which relief can be granted, therefore certiorari should be denied.

ARGUMENT

I. THE COURT BELOW DID NOT ERR IN HOLDING THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE "AVOIDING ARREST" AGGRAVATING FACTOR ON DIRECT APPEAL, THEREFORE CERTIORARI SHOULD BE DENIED.

Petitioner contends that the court below erred in holding that appellate counsel was not ineffective for failing to

challenge the use and finding of the "avoiding arrest" aggravating factor on direct appeal.[1] This Court has held that a criminal defendant has a right to effective assistance of counsel on appeal. *See Evitts v. Lucey*, 469 U.S. 387, 397 (1985). Claims of ineffective assistance of counsel on appeal are assessed under the now familiar two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and recently reaffirmed in *Williams v. Taylor*, ___ U.S. ___, 120 S.Ct. 1495 (April 18, 2000). The court below properly applied the strict *Strickland* test in assessing the claim that appellate counsel was ineffective for failing to raise the claim regarding the "avoiding arrest" aggravating factor on direct appeal. The court below clearly addressed the prejudice prong of *Strickland*, there was no clear discussion of the deficiency prong. However, this is not fatal to the inquiry. A court is allowed to proceed to the

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[1]Here, as in the court below, petitioner attempts to use an ineffective assistance of counsel claim to reach the substantive merits of a barred claim.

prejudice prong of the test and determine the case on that basis without reference to the deficiency prong. *Strickland*, 466 U.S. at 697. The ultimate question that must be asked as it relates to the challenge to this death sentence, is there

> a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

466 U.S. at 697.

Based on the holding of the court below there is no reasonable probability that the outcome of the direct appeal would have been different had appellate counsel raised the present claims regarding the "avoiding arrest" aggravating factor. As here, petitioner raised the exact three grounds for assertion of ineffectiveness in his state post-conviction application.

The first claim was that there was no evidentiary support upon which the jury could base a finding of this aggravating

factor. However, the Mississippi Supreme Court found that there was sufficient evidence upon which to find this aggravator. The Court held:

> ¶ 47. "'Thus, it is this Court's role to inquire into whether there is any credible evidence upon which the jury could find the aggravating circumstance in question.'" *Woodward*, 726 So.2d at 541 (quoting *Carr v. State*, 655 So.2d 824, 854 (Miss.1995)). In the case sub judice, Wiley fired three shots, which killed one of the two witnesses to the robbery, and seriously injured the other witness. The decedent, a storeowner, knew Wiley, a patron of the store. Wiley left the murder weapon and a box (which had contained a money bag) in a nearby, thickly wooded area that had dense undergrowth. The area was described as "gullies, briars, it was just one big thicket, it was just almost impenetrable." In addition, Wiley left the money bag "laying in some weeds", in a field near a "dirt road".
>
> ¶ 48. The victims in this case knew Wiley. Furthermore, Wiley's efforts to dispose of and/or conceal the evidence of his crime are sufficient to support the avoiding arrest instruction. That is, there is evidence from which the jury could have reasonably inferred that a substantial reason for the murder was to conceal Wiley's identity, or cover his tracks, so as to avoid apprehension and eventual arrest. Therefore, the granting of the instruction on this aggravator was proper. *See generally Woodward*, 726 So.2d at 541 (the fact that the defendant threw the murder weapon in a creek could reasonably indicate that he did not want to

be arrested).

750 So.2d at 1206, ¶¶ 47-48.

Later in the opinion, the court below, in addressing a claim on the substantive merits of the claim held:

> ¶ 65. Wiley next argues that the evidence was insufficient to support the jury's finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest. ". . . [T]his claim was not raised on appeal. Therefore, without making the necessary showing of cause and actual prejudice, this claim is barred from belated consideration on post-conviction review." *Foster v. State*, 687 So.2d 1124, 1140 (Miss.1997).
>
> ¶ 66. Furthermore, as previously discussed, the evidence in this case was sufficient to support the avoiding arrest aggravator. Therefore, even if this issue were not procedurally barred, Wiley's argument would fail.

750 So.2d at 1210, ¶¶ 65-66.

Clearly, the court below held that the outcome would have been the same had a claim relating to the evidentiary sufficiency been raised on direct appeal. Thus, Wiley failed to prove the prejudice prong of the *Strickland* test. When a court proceeds

to the prejudice prong first and finds no prejudice, there is no requirement that the deficient performance prong be addressed. Since the Mississippi Supreme Court found that there was sufficient evidence to support this aggravating factor there can be no prejudice.

The second claim under this question is that appellate counsel failed to raise the claim on appeal that the "avoiding arrest" aggravating factor was unconstitutionally overbroad. Here, as below, Wiley makes no attempt to argue this as a claim of ineffective assistance of counsel instead he argues the substantive merits of whether or not the "avoiding arrest" aggravating factor was overbroad. At trial counsel objected to the granting of the "avoiding arrest" aggravating factor on the basis of evidentiary sufficiency, he did not raise the claim that this aggravating factor was overbroad. This specific claim was not raised on direct appeal. Thus petitioner was double barred by not raising this claim at trial or on direct appeal. However,

the court below considered the claim in the context petitioner raised it and held the claim to be without merit. 750 So.2d at 1206-07, ¶¶ 49-51.

Finally, petitioner again argues that the "avoiding arrest" aggravator duplicates the "committed during the commission of a robbery" aggravator and therefore appellate counsel should have raised this claim on direct appeal, even though it was not raised at trial. It would have been barred had it been raised on direct appeal for the failure to raise it at trial. Further, the court below held that the "avoiding arrest" aggravator and the "robbery" aggravator are not the same. The Court held:

> ¶ 53. These arguments are basically a reiteration of those raised in the preceding subsection. As discussed above, more evidence is required to support the "avoiding arrest" instruction than evidence of a robbery and a murder. Therefore, Wiley's contentions on this point are without merit.
>
> 750 So. 2d at 1208, ¶ 53.

The court below concluded its discussion of this issue holding:

> ¶ 54. Thus, Wiley's ineffectiveness of counsel

> claim on this point is without merit. That is, even if appellate counsel's performance could be considered deficient for failing to raise the issue of the "avoiding arrest" instruction, Wiley has not proven the requisite prejudice to support an ineffectiveness of counsel claim. Therefore, Wiley's arguments on this point fail. *See Hodgin*, 702 So.2d at 116-17 (Miss.1997) (reiterating that burden is on petitioner to prove both prongs of the *Strickland* test).
>
> 750 So.2d at 1208, ¶ 54.

When the Mississippi Supreme Court did not find any prejudice resulting from appellate counsel's action it was not required to address the deficient performance prong of *Strickland*. However, the respondent would submit that petitioner cannot even prove deficient performance. Counsel's performance must be viewed in the light of what he knew at the time. The court below had addressed this same question on numerous occasions over the years and held the mere killing of the victim does not automatically give rise to this aggravating circumstance. Other factors must be presented to show that the defendant was killing the victim to "cover his tracks." "If there

is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer . . . to 'cover their tracks' so as to avoid apprehension and eventual arrest . . . it is proper for the court to allow the jury to consider this [aggravator]." *See Walker v. State*, 740 So.2d 873, 888, ¶¶ 63-65 (Miss. 1999); *Puckett v. State*, 737 So.2d 322, 361-62, ¶¶ 123-26 (Miss. 1999); *Edwards v. State*, 737 So.2d 275, 312, ¶¶ 120-22 (Miss. 1999); *Manning v. State*, 735 So.2d 323, 350, ¶¶ 73-74 (Miss. 1999); *Woodward v. State*, 726 So.2d 524, 540, ¶¶ 66-73 (Miss. 1997); *West v. State*, 725 So.2d 872, 884, ¶¶ 41-42 (Miss. 1998); *Evans v. State*, 725 So.2d 613, 689-90, ¶¶ 348-53 (Miss. 1997); *Brown v. State*, 682 So.2d 340, 355-56 (Miss. 1996); *Doss v. State*, 709 So.2d 369, 390-91, ¶¶ 88-91 (Miss. 1996); *Taylor v. State*, 672 So.2d 1246, 1275 (Miss. 1995); *Walker v. State*, 671 So.2d 581, 611-12 (Miss. 1995); *Carr v. State*, 655 So.2d 824, 853-54 (Miss. 1995), *cert. denied*, 515 U.S. 1076 (1996); *Chase v. State*, 645 So.2d 829,

856-58 (Miss. 1994), *cert. denied*, 515 U.S. 1123, *reh. denied*, 515 U.S. 1179 (1995); *Hansen v. State*, 592 So.2d 114, 152-53 (Miss. 1991); *Lanier v. State*, 533 So.2d 473, 490 (Miss.1988); *Tokman v. State*, 435 So.2d 664, 671 (Miss.1983); *Leatherwood v. State*, 435 So.2d 645, 650-51 (Miss. 1983), *cert. denied*, 465 U.S. 1084 (1984).

Also, the Mississippi Supreme Court, since 1983, held that a capital defendant is not entitled to a limiting instruction on the "avoiding arrest" aggravating factor. *See Manning v. State*, 735 So.2d 323, 350, ¶ 73-74 (Miss. 1999); *Bell v. State*, 725 So.2d 836, 858, ¶ 72 (Miss. 1998); *Evans v. State*, 725 So.2d 613, 689-90, ¶¶ 348-53 (Miss. 1997); *Holland v. State*, 705 So.2d 307, 355-56 (Miss. 1997); *Brown v. State*, 682 So.2d 340, 355-56 (Miss. 1996); *Doss v. State*, 709 So.2d 369, 390-91, ¶¶ 88-91 (Miss. 1996); *Walker v. State*, 671 So.2d 581, 611-12 (Miss. 1995); *Hansen v. State*, 592 So.2d 114, 152-53 (Miss. 1991); *Leatherwood v. State*, 435 So.2d 645, 651 (Miss. 1983).

Faced with this array of precedent from the court below there was little chance of success on the merits of any claim relating to this aggravating factor. Looking at the deficient performance prong in this case it cannot be said that counsel's performance was deficient as there was no likelihood that the Mississippi Supreme Court would reverse itself and grant relief on this claim had it been properly preserved for review on direct appeal.

Since petitioner has shown neither deficient performance or prejudice, as required by *Strickland*, he has failed to state a constitutional ground for relief and certiorari must be denied.

II. THE COURT BELOW DID NOT ERR IN HOLDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE SO-CALLED "SEND A MESSAGE" ARGUMENT AT THE SENTENCING HEARING IN THIS CASE, THEREFORE CERTIORARI SHOULD BE DENIED.

Next petitioner contends that trial counsel demonstrated ineffective assistance of counsel for failing to object to the State's "send a message" argument. This claim is also assessed under the above mentioned test set forth in *Strickland*.

Petitioner presented this claim below as both an ineffective assistance of counsel claim and a substantive claim on the merits. The court below considered the substantive claim and held:

> ¶ 64. As stated previously, this issue is procedurally barred under MISS CODE ANN. Section 99-39-21(1) (1994). *See Mack*, 1998 WL 240123 at *6; *Foster v. State*, 687 So.2d at 1135. However, even if consideration of this issue were not barred, Wiley's argument would fail. That is, the "danger inherent in the 'send a message' argument . . . does not exist at the sentencing phase . . .". *Wells*, 698 So.2d at 513-14; *Holly*, 716 So.2d at 985. Therefore, Wiley's argument is without merit.
>
> 750 So.2d at 1210, ¶ 64.

The court below addressed substantive merits of the claim in an alternative holding. By doing so the procedural bar imposed is not waived. *See Michigan v. Long*, 463 U.S. 103 (1983); *Harris v. Reed*, 489 U.S. 255 (1989). The claim was clearly held to be without merit. If there is no merit to the substantive claim there can be no deficient performance in failing to object and not prejudice. *See Mayabb v. Johnson* 168 F.3d 863, 869 (5th Cir.

1999) (where there is not error at trial, there is no error at the appellate level for failure to assert an error); *Jackson v. Johnson*, 150 F.3d 520, 525-26 (5th Cir. 1998) ("An Attorney's failure to raise a meritless argument thus cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue."); *Ricalday v. Procunier*, 736 F.3d 203, 208 (5th Cir. 1984) ("Because the error at the appellate stage stemmed from the error at trial, if there was no prejudice from the trial error, there was also not prejudice from the appellate error.").

In addressing the ineffective assistance of counsel claim the court below held:

> ¶ 40. This Court has "cautioned prosecutors to refrain from using this type of argument." *Wells v. State*, 698 So.2d 497, 513 (Miss.1997) (citing *Hunter v. State*, 684 So.2d 625, 637 (Miss.1996); *Williams v. State*, 522 So.2d 201, 209 (Miss.1988)). However, in recent cases, this Court has acknowledged that the warning expressed in previous cases is inapplicable to closing arguments during the sentencing phase of capital

murder cases:

> . . . [T]he danger inherent in the "send a message" argument is that jurors will neglect their duty to determine whether "the evidence showed the defendant to be guilty of the crime charged." This danger does not exist at the sentencing phase, where the defendant has already been found guilty of capital murder. The sole determination to be made at this point is whether the death penalty should be imposed. We choose not to fault the prosecution for arguing that the "message" conveyed by a death penalty verdict would be different than that urged by the defense. To do so would be disingenuous given the inescapable reality that deterrence is, in fact, an established goal of imposing the death penalty, which goal necessarily entails, to some extent, sending a message. The trial court did not err in permitting this argument by the prosecution.

Wells v. State, 698 So.2d at 513-14 (Miss.1997) (citations omitted); *Holly v. State*, 716 So.2d 979, 985 (Miss.1998).

¶ 41. Given this authority, Wiley's argument is without merit. That is, even if defense counsel's performance could be considered deficient (for failing to object to the prosecutor's comments), there was no resulting prejudice. *See Hodgin*, 702 So.2d at 116-17 (Miss.1997) (reiterating that burden is on petitioner to prove both prongs of the *Strickland* test).

750 So.2d at 1205, ¶¶ 40-41.

The court below pointed out that the claim was procedurally barred on the merits and alternatively that it was not an improper argument. Further, the court found that trial counsel was not ineffective for not raising the issue at trial because if an objection had been interposed it would not have been error to overrule the objection. Thus, petitioner failed to prove the required prejudice showing there was a reasonable probability that the result of his sentencing hearing would have been different had counsel objected to the comments. Clearly, if the underlying substantive claim is held to be without merit then there can be no prejudice. *See Mayabb v. Johnson*, *supra* at 869; *Jackson v. Johnson*, *supra* at 525-26; *Ricalday v. Procunier*, *supra* at 208. That is the case we find here. Petitioner has failed to show a violation of any constitutional right and thus certiorari should be denied.

CONCLUSION

Because the underlying substantive claims were held to be without merit petitioner failed to establish the requisite prejudice to support a claim of ineffective assistance of counsel in either of his questions presented. Based on the above and foregoing reasons the petition for writ of certiorari attacking the denial of post-conviction relief by the Mississippi Supreme Court should be denied.

Respectfully submitted,
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